

UNITED STATES COURT OF APPEALS

**Filed 6/25/96**

TENTH CIRCUIT

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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 95-6443
	)	(D.C. No. CR-94-77-W)
ALEXANDER MIHALY,	)	(W.D. Okla.)
	)	
Defendant-Appellant.	)	

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ORDER AND JUDGMENT

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Before TACHA, BALDOCK, and BRISCOE, Circuit Judges.\*

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This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Defendant Alexander Mihaly pleaded guilty to wire fraud, 18 U.S.C. § 1343, and two counts of mail fraud, 18 U.S.C. § 1341. The district court sentenced him to fifteen months imprisonment on each count, and ordered the sentences to run concurrently. The court, however, ordered the fifteen-month sentences to run consecutive to Defendant's four prior federal sentences, noting that it had "no discretion" to do otherwise. On

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\* The parties waived oral argument. The case is therefore ordered submitted on the briefs.

appeal, we reversed and remanded for resentencing. United States v. Mihaly, 67 F.3d 894, 895 (10th Cir. 1995). We held that the district court erred by concluding it lacked discretion to order Defendant's instant sentences to run consecutive to his prior sentences. We noted that "a district court 'retains discretion to depart [from the guidelines], subject to review, if it determines that factors relevant to the sentencing have not been addressed adequately by the [g]uidelines.'" Id. at 896 (quoting United States v. Shewmaker, 936 F.2d 1124, 1127 (10th Cir. 1991), cert. denied, 502 U.S. 1037 (1992)).

On remand, the district court held a resentencing hearing. After hearing argument, the court concluded Defendant had demonstrated no basis for a departure from the guidelines, and again ordered Defendant's instant fifteen-month sentences to run consecutive to his prior sentences: "The Court finds no basis for a departure from the guidelines in order to allow these [sentences] to run concurrent as opposed to consecutive, so the sentence previously imposed will be the sentence that will remain in effect at resentencing." This appeal followed.

On appeal, Defendant argues the district court should have departed from the guidelines and ordered his instant sentences to run concurrent with his prior sentences. Defendant contends the court did not consider U.S.S.G. § 5G1.3(b), or the resulting delay in Defendant's parole release date. We conclude the court did not misapply the guidelines. We have no jurisdiction to review the district court's discretionary refusal to

depart, and therefore DISMISS the appeal. United States v. Rodriguez, 30 F.3d 1318,  
1319 (10th Cir. 1994).

DISMISSED.

Entered for the Court

Bobby R. Baldock  
Circuit Judge